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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 904.

A. M. LANDMAN, Superintendent of the Five Civilized Tribes, for Estate of JEANETTA BURGESS, Nee TIGER, Deceased Creek, Roll No. 5069, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HUSTON THOMPSON,
OSCAR P. MAST,
Washington, D. C.,
Counsel for Petitioner.

January 27, 1942.

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v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

PETITION.

The petitioner, A. M. Landman, Superintendent of the Five Civilized Tribes, for the Estate of Jeanetta Burgess, nee Tiger, Deceased Creek, Roll No. 5069, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause, affirming a judgment of the United States Board of Tax Appeals, which found a deficiency against petitioner of Federal estate tax in the above-named estate.

STATEMENT.

Jeanetta Burgess, nee Tiger, a fullblood, restricted Creek Indian, died intestate on January 10, 1935. She left as her heirs a husband, seven children and three grandchildren, all of whom were fullblood, restricted Creek Indians. At her death she was seized of a restricted allotment of land having an agreed value of $3,000.00, Liberty Bonds having an agreed value of $227,243.41, and cash with the petitioner in the amount of $4,754.89. The Liberty Bonds represented the invested proceeds derived from the production of oil and gas from the allotment, all of which were restricted funds held by the Secretary of the Interior under the direct supervision and control of the petitioner (R. 15-16).

The respondent included in the gross estate of the decedent the value of decedent's allotment of land, Liberty bonds and cash, and determined a deficiency in the Estate Tax based thereon of $15,053.48 (R. 9). Petitioner appealed to the Board of Tax Appeals, contending (1) That the decedent did not have an interest in property within the meaning of Section 302 (a) of the Revenue Act of 1926, because the interest of the decedent in the property was so deleted by statutory restriction and governmental practice and regulations thereunder that the decedent, at the time of her death, had nothing to transfer but a hollow interest in the estate; and (2) that assuming decedent did have such an interest in property, the value of her allotted land and the income derived therefrom is exempt from the Federal estate tax by virtue of a series of treaties, agreements and acts of Congress, culminating in the Act of April 26, 1906, (34 Stat. 137, Sec. 19). The Board affirmed the determination of the Commissioner that decedent's estate was subject to the Federal Estate Tax, but reduced the deficiency to $14,766.68 due to the allowance of certain additional deductions from the gross estate (R. 14). The petitioner thereupon appealed to the Circuit Court of Appeals for the Tenth Circuit (R. 23). That Court affirmed the decision of the Board (R. 54).

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that this restricted Creek Indian who died January 10, 1935, had an interest in property within the meaning of Section 302 (a) of the Revenue Act of 1926.

(2) In holding that the value of the allotted land and the income derived therefrom of such Indian was not exempt from the Federal Estate Tax.

(3) In applying the same principles of taxation to the estate of this fullblood, restricted Indian as those applied to estates of white citizens under no restrictions.

REASONS FOR GRANTING THE WRIT.

(1) The question of whether the estate of a restricted Creek Indian is subject to the Federal estate tax is a highly important question of Federal law which has not been, but should be, settled by this Court. This case is one of first impression, and one to determine the liability to the Federal estate tax of a great number of similar estates of restricted Indians, involving in total a large sum of money. It concerns the construction of an agreement between the Creek Tribe of Indians and the United States, providing for tax exemption of their restricted lands, as well as the question of whether a restricted Indian has an interest in property within the meaning of the Revenue laws.

(2) The holding of the Court below conflicts in principle with the decisions of this Court in *Heckman* v. *United States*, 224 U. S. 413; *Mullen* v. *United States*, 224 U. S. 448; *Choate* v. *Trapp*, 224 U. S. 665; *English* v. *Richardson*, 224 U. S. 680; *Carpenter* v. *Shaw*, 280 U. S. 363; *Superintendent* v. *Commissioner*, 295 U. S. 418; and *United States* v. *Santa Fe Pac. R. Co.*, 62 S. Ct., 248.

(3) The question presents a long standing contest between the Treasury Department, represented by the Com-

missioner of Internal Revenue, who seeks to impose the tax, and the Interior Department, through the Superintendent of the Five Civilized Tribes, who seeks to protect the instrumentality chosen by the Government out of the Indians' own property for the care of the Indians, by avoiding imposition and collection of the tax which will eventually, if not very soon, destroy the entire instrumentality and make the Indian a charge upon the Government.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit should be granted.

HUSTON THOMPSON,
OSCAR P. MAST,
Washington, D. C.,
Counsel for Petitioner.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

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BRIEF IN SUPPORT OF THE PETITION.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 18) is reported in 42 B. T. A. 958. The opinion of the Circuit Court of Appeals (R. 54) is reported in 123 F. (2d) 787.

JURISDICTION.

The judgment of the court below was entered November 11, 1941 (R. 60). The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Whether a restricted Creek Indian has an interest in property within the meaning of Section 302 (a) of the Revenue Act of 1926.

(2) If so, whether the value of the allotted land and income derived therefrom of such Indian is exempt from the Federal estate tax.

TREATIES AND STATUTES INVOLVED.

The Treaties and Statutes involved are printed as an Appendix to this brief.

STATEMENT OF CASE.

A statement of the case and the errors relied upon will be found in the petition.

ARGUMENT.

An Important Class Case of First Impression.

This is a case of first impression. It is a class case of far reaching importance as it will determine the liability to the Federal estate tax of a great number of estates of restricted Indians, involving altogether a large sum of money. It will not only determine whether Indian heirs in this case will be deprived of part or eventually all of the instrumentality which Congress and a President of the United States, Theodore Roosevelt, solemnly agreed with the Indians should be exempt from any tax, but in other cases other Indian heirs, of whom there are or will be thousands, will be deprived of either a part or all of a nontaxable instrumentality.

This case presents a situation in which our Government induced the Indian by threat and force to set up an instrumentality selected jointly by the Indian and the Government

from the Indian's own property to protect him from becoming a charge on our Government. At the instance of the Government the Indians surrendered millions of acres of nontaxable lands held in common and pledged forever as free from tax.

This is an act by one division of the Government—the taxing power—in the face of the statute of April 26, 1906 (34 Stat. 137) declaring the Indian's land free from taxation, to eventually destroy that instrumentality by taxation. It challenges Congressional legislation which not only set up the instrumentality but took it completely out of the hands of the Indian.

This case also presents the novel situation of the taxing department of the Government seeking to impose an estate tax on the passing of this instrumentality when Congress has completely reversed the idea of emancipating the Indian from his status as a ward and becoming tax liable. No longer does the language of *Choteau* v. *Burnet*, 283 U. S. 691, which declared that the course of legislation discloses a plan to release the Indian's property to his own individual management and subject it to taxation, apply to the Indian. On the contrary, after long investigation and hearings, Congress passed the Wheeler-Howard Act (48 Stat. 984). By the Act of June 26, 1936 (49 Stat. 1967) Congress blanketed the Five Civilized Tribes under most of the provisions of the Wheeler-Howard Act. Under the Wheeler-Howard Act the program of land acquisition for Indian tribes and groups is country-wide and includes 13 projects within the Five Tribes area in Oklahoma. As of August 6, 1940, the Government had purchased a total of 298,005.62 acres of land at a total cost of $3,690,160.89, which includes 28,187.04 acres purchased for the 13 projects within the Five Tribes area at a total cost of $470,198.16, all of it free of taxation. The whole purpose of the Wheeler-Howard Act, and subsequent acts, has been to acknowledge the mistake of the Government; to restore to the Indian in common, nontaxable and undiminishable, lands for him to live on with his fellow Indians, with his own self-gov-

ernment, as of old, and to save his culture and civilization.

The question of whether the estate of a fullblood, restricted Creek Indian is subject to the Federal estate tax has not been decided by this Court. The instant case is the only case instituted and prosecuted in the courts to determine this question. The only case which has come before this Court involving Federal taxation of restricted Indians is that of *Superintendent* v. *Commissioner*, 295 U. S. 418. This case involved the sole question of whether the reinvested income of a restricted Creek Indian is exempt from the Federal income tax. This Court held that such reinvested income was not exempt from Federal income tax under any agreements with the Creeks or by any Act of Congress dealing with their affairs. In so holding this Court pointed out that there was an exemption from taxation in Section 19 of the Act of April 26, 1906, but that this exemption related to land and not to income derived from investment of surplus income from land. The question in the instant case of whether the value of the allotted land and the direct income therefrom is exempt from the Federal estate tax has, therefore, not been settled by this Court.

The Question of Law Involved in This Case Should Be Settled by This Court.

The answer to the question of whether the estate of decedent is subject to the Federal estate tax involves a consideration of two ultimate questions. They are: (1) Whether a restricted Creek Indian has an interest in property which is subject to the Federal estate tax; and (2) if so, is the value of such property in whole or in part exempt from the Federal estate tax by treaties, agreements and acts of Congress.

The court below answered these questions just as if the Indian were on the same footing as a white citizen. The court below has strictly construed the language of all the treaties, agreements and acts having to do with taxation of the Indians' allotment in favor of the Government,

whereas this Court has said that such language must be viewed most favorably to the Indian, must be considered as the Indian would naturally understand it, not in a technical sense against him and never to his prejudice. Doubtful expressions should be resolved in his favor and no subsequent legislation should narrow the Indian's understanding of it. Words susceptible of a more extended meaning than their plain import, as connected with the tenor of a treaty, should be considered as used only in the latter sense. The Indian's understanding must control and be the yardstick by which the question is determined. *Carpenter* v. *Shaw*, 280 U. S. 363; *Choate* v. *Trapp*, 224 U. S. 665.

Petitioner's first contention is that decedent did not have an interest in property at the time of her death within the meaning of the taxing statute because the interest of decedent in her property was so deleted by statutory restriction and governmental practice and regulations thereunder that decedent had nothing but a hollow interest to transfer at her death, which had no present value, and only a potential value which may never come into being.

To demonstrate the extent to which decedent's interest in her property was deleted, the Court's attention is called to the following facts: All of decedent's property was under the absolute control of the Secretary of the Interior, except her right to reside on her allotment, and she had no recourse to the courts by mandamus or otherwise to obtain possession of the same; decedent could not make a valid will unless the same was approved by certain prescribed officials; decedent had the use of only so much of her money, by monthly payments, as the Secretary thought was necessary for the maintenance and support of the decedent and her dependents; title to personal property purchased by the Secretary for decedent was taken in the name of the United States; decedent could not lease her property without the approval of the Secretary; decedent could not alienate any of her property, real or personal; decedent was never consulted with reference to the management of her restricted

moneys, as the duty of handling restricted moneys has by statute been lodged with the Secretary; and decedent received no interest on the money which she was compelled to carry on deposit with the Treasurer of the United States.

In other words, the decedent had no power or exercise of control over the alloted land or any property that flowed from the allotted land, except the right of occupancy of the land; she could not dispose of the land or the funds derived therefrom; and she had no control over the moneys coming into the Department or over the lease on the land; nor did her heirs, all being fullbloods, have any more control.

Notwithstanding all of the above, the court below held that the decedent had an interest in property within the meaning of the taxing statute. In so holding, the court below relied upon the statements of this Court in *Choteau* v. *Burnet*, 283 U. S. 691, and *Superintendent* v. *Commissioner*, *supra*. But this Court in these cases did not decide this precise question. What this Court did decide and what the court below has apparently relied upon in this respect is that taxation of income from trust funds of an Indian ward is not so inconsistent with that relationship that exemption from taxation is a necessary implication. Petitioner contends in the instant case that the value of decedent's interest in her property was so restricted and deleted that it did not have a value within the meaning of the taxing statute. If petitioner is right, the court below has misapplied the statements of this Court in *Choteau* v. *Burnet*, *supra*, and *Superintendent* v. *Commissioner*, *supra*, to petitioner's first contention.

If the answer to the first question is that the decedent did have an interest in property within the meaning of the taxing statute, then the petitioner respectfully submits that such property is exempt from the Federal estate tax by virtue of treaties, agreements and acts of Congress.

The court below held that the vested right to exemption from taxation created by the agreement between the United States and the Indian, will not be extended to include taxes

which do not fall directly upon the tax-exempt property; that such exemption does not include the direct income derived from the tax-exempt land; and that such exemption can not be extended to the estate tax, which is an excise tax upon the shifting of the economic burdens and benefits, or on the privilege of transferring property of decedent at death.

In arriving at its conclusion that the exemption from taxation of the allotted lands does not include the direct income derived therefrom, the court below relied upon the holding of this Court in the case of *Superintendent* v. *Commissioner, supra,* and stated that "the court made a clear distinction between a tax levied upon land as such, and the income derived therefrom." But this Court did not make such a distinction. This Court, in *Superintendent* v. *Commissioner, supra,* in referring to the exemption provision in Section 19 of the Act of April 26, 1906, held that the "exemption related to land and not to income derived from investment of surplus income from land." Furthermore, the statement of this Court that "We find nothing in either act which expresses definite intent to exclude from taxation *such income* as that here involved." (Emphasis ours), indicates that this Court did make a distinction, by inference at least, between reinvested income and direct income.

After the decision of this Court in *Superintendent* v. *Commissioner, supra,* the Assistant General Counsel for the Bureau of Internal Revenue issued a memorandum (G. C. M. 16020, C. B. June, 1936, p. 78), showing his understanding of that decision with respect to the taxability of income of restricted Indians of the Five Civilized Tribes. The pertinent parts of said memorandum are quoted as follows:

> "An opinion is requested as to what changes, if any, are to be made in procedure with reference to the taxability of income of restricted Indians of the Five Civilized Tribes on account of the decision of the Supreme Court of the United States in *Superintendent of Five Civilized Tribes (on behalf of Sandy Fox)* v. *Commissioner* (295 U. S., 418, Ct. D. 974, C. B. XIV-1, 158).

"That case involved the taxability of the income of a restricted Indian derived from the reinvestment of income from restricted allotted lands, the original income having been considered to be tax-exempt as from a tax-free source. It has been the consistent position of the Bureau that the reinvestment income is taxable. (See *Katie Snell et al.* v. *Commissioner*, 10, B. T. A., 1081, and G. C. M. 9621, C. B. X-2, 111.) The decision of the United States Supreme Court in *Superintendent, etc.*, v. *Commissioner*, supra, confirms that position. * * *

"This office is of the opinion, therefore, that no change in the procedure followed by the Bureau for the period up to April 26, 1931, in respect of the taxability of the restricted allotted lands of the members of the Five Civilized Tribes, and of the income derived directly therefrom, is required on account of the decision of the Supreme Court in *Superintendent, etc.* v. *Commissioner, supra.* The procedure to be adhered to beginning with April 26, 1931, is indicated by the above review of the express legislation of Congress in the Acts of May 10, 1928, and January 27, 1933.

"With reference to the taxability of reinvestment income, it has been indicated above that the Bureau's position has consistently been that such income is taxable, and that the decision in *Superintendent, etc.*, v. *Commissioner*, supra, is but an affirmation of a long standing position of the Bureau.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue."

The Court below in reaching its conclusion that the exemption does not extend to the estate tax has followed decisions of this Court in cases involving property held by white citizens under no disability, and has ignored the decisions of this Court such as *Carpenter* v. *Shaw, supra*, and *Choate* v. *Trapp, supra*, prescribing the rules to be followed in dealing with the rights acquired by the Indian under agreements with the United States. Petitioner admits that

in the usual case, of an unrestricted citizen, an exemption from taxation of land would not exempt the value of the same from the estate tax. But this is not the usual case. It is a case of a restricted Indian, and this Court has said that in dealing with the question of exemption from taxation of property of restricted Indians, the exemption must be liberally construed in favor of the Indian. If there is doubt, then the doubt must be resolved in favor of the Indian. The question must be construed from the point of view of what the Indian understood the agreement to be.

In *Choate* v. *Trapp, supra,* in considering the question of tax exemption of the homestead of Choctaw and Chickasaw Indians, this Court stated:

> "But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

This Court in the case of *Carpenter* v. *Shaw, supra,* which involved the question of exemption from taxation of allotted land of Choctaw Indians, stated as follows:

> "While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, *Heiner* v. *Colonial Tr. Co.,* 275 U. S. 232, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. *Choate* v. *Trapp, supra.*
>
> "Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall: 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use

of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' *Worcester* v. *The State of Georgia,* 6 Pet. 515, 582, 8 L. Ed. 483. See *The Kansas Indians,* 5 Wall. 737, 18 L. Ed. 667. And they must be construed, not according to their technical meaning, but 'in the sense in which they would naturally be understood, by the Indians.' *Jones* v. *Meehan,* 175 U. S. 1, 11, 20 S. Ct. 1, 44 L. Ed. 49."

Prior to allotment, the Indian had held his property in common with the others of his tribe, and except for the taxes imposed by the tribe, never came in contact with the question of taxation. Considering all the circumstances, it would be unfair to him to say when the phrase "exemption from taxation" was used in the agreement that the Indian did not believe that he had an exemption from all forms of taxation, including the Federal estate tax. If the Indian believed that he had an exemption from all taxation, then the pronouncements of this Court in the cases of *Choate* v. *Trapp, supra,* and *Carpenter* v. *Shaw, supra,* require that the exemption be extended to the estate tax.

The General Counsel of the Treasury Department, the late Mr. Oliphant, issued a ruling under date of December 28, 1935, (GC:I:EWM A-281892) extending the exemption from taxation of allotted lands to include the estate tax. Following this ruling the Bureau of Internal Revenue excluded from the gross estates of many deceased members of the Five Civilized Tribes the value of their allotted land, including the minerals in place underlying said land. After reviewing the various acts of Congress and decisions of the Courts on the question, including this Court's decision in *Superintendent* v. *Commissioner, supra,* the General Counsel laid down rules for the disposition of any pending tax cases involving the restricted members of the Five Civilized Tribes as follows:

"(1) Up to April 26, 1931, all restricted allotted lands (including restricted substituted lands purchased

out of the proceeds of sale of restricted allotted lands), and the income therefrom, shall be treated as exempt from Federal taxation so long as restrictions on alienation thereof imposed by Congress continued in effect. Under the Act of 1908, section 9, (35 Stat. 315) all restrictions on such lands ceased on the death of the restricted allottee, except to the extent of the interest therein which passed to full-blood Indian heirs. *As was pointed out in G. C. M. 10752, supra, exemption from Federal estate tax is to be accorded only to the extent that the property passed to full-blood Indian heirs and devisees.* It should be borne in mind that exemption is not to be extended to additional purchased lands, although subject to restrictions on alienation imposed by the Secretary of the Interior, acquired as a reinvestment of tax-exempt income, which purchased lands and the income therefrom have at all times been subject to taxation, *Carpenter* v. *Shaw,* supra.

"(2) All minerals produced on and after April 26, 1931, from restricted allotted or substituted lands of every description, and the entire interest in and to restricted allotted or substituted lands in excess of 160 acres held by any one restricted Indian, became subject to taxation on and after April 26, 1931.

"(3) Except as to minerals produced therefrom, the restricted allotted or substituted lands not exceeding 160 acres, designated by the certificate of exemption filed with the Superintendent for the Five Civilized Tribes and recorded in the proper county, remain exempt from taxation from and after April 26, 1931, while owned by the Indian designated in said certificate, and to the extent of the interest in such lands which passed to the full-blood Indian heir or devisee prior to January 27, 1933. From and after the latter date, such designated restricted allotted or substituted lands remain exempt from taxation in the Indian designated in the certificate and to the extent of the interest therein which passes to any restricted Indian heir, devisee or donee.

"(4) The royalty interest of the land owner, representing an undivided interest in unproduced minerals under any mineral lease of restricted lands, must be taken to be a part of the realty, *U. S.* v. *Noble,* supra,

and its inclusion or exclusion from the gross estate for Federal estate tax purposes must be governed by the taxability of the realty." (Emphasis ours)

Subsequent to the decision of the Board of Tax Appeals in the instant case, the Bureau reincluded the value of the allotted land and minerals in place in the gross estates of those decedents.

Another very important reason why this Court should settle the question involved is that it presents a contest between the Treasury Department, through the Commissioner of Internal Revenue, who seeks to impose the tax, and the Department of the Interior, through the Secretary of the Interior and the Superintendent of the Five Civilized Tribes, who seek to avoid imposition and collection. The decision of the Court below is keyed to the idea that a restricted Indian's allotment is to be treated exactly as if it were the property of a white citizen under no restrictions, and that this is simply a case between the United States and one of its citizens. The fact is, however, that this case presents a momentous issue not only with respect to the restricted property of helpless and dependent Indians, but between two departments of the same government. In the instant case the problem and the extent of probable injury is much more serious than in *Superintendent* v. *Commissioner*, *supra*, which involved the simple question of the imposition of an income tax upon the proceeds derived from invested income from the allotment. In the instant case a decision favorable to the view of the respondent will undoubtedly result in subjecting the allotments of all such Indians, and the direct proceeds therefrom, to all forms of taxation imposed by City, County, State and the Federal Governments, and will inevitably mean the wiping out of the instrumentality set up for the protection of the Indian, that is, the nontaxable allotment of the restricted Indian who once owned it in common with his tribe, and make the Indian a charge upon the Treasury of the Government.

It is because of this state of facts that the Department of the Interior, through many administrations, has fought against this encroachment on, and destruction of this instrumentality. Wholly aside from the legal, humanitarian and ethical conditions that plead for consideration, the duty is laid upon the Secretary of the Interior by Congressional legislation to protect the Indian, his property and his welfare. To wipe out this instrumentality has seemed to the Department of the Interior, through a long line of Secretaries, a direct attack upon the Indians and legally unconscionable when the facts are known as to the conditions under which the instrumentality was created and has been administered, held and controlled.

CONCLUSION.

It is respectfully submitted that this case presents an important question of Federal law which has not been, but should be, settled by this Court; that the holding of the Court below in this case is in conflict in principle with applicable decisions of this Court and that whatever the correct answer to the question presented may be, it should be settled by this Court for future guidance of the parties in dealing with taxation problems of restricted Indians.

Respectfully submitted,

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January 27, 1942.

APPENDIX.

Excerpts From Treaties, and Statutes.

TREATIES.

Indian—Creek Tribe:

Treaty of January 24, 1826 (7 Stat. 286).

Preamble:

"* * * And whereas the United States are unwilling that difficulties should exist in the said Nation which may eventually lead to an internecine war, and are still more unwilling that any cessions of land should be made to them, unless with the fair understanding and full assent of the Tribe making such cession, *and for a just and adequate consideration, it being the policy of the United States, in all their intercourse with the Indians, to treat them justly and liberally, as becomes the relative situation of the parties.* * * *" (Emphasis ours)

Article 13:

"*The United States agree to guarantee to the Creeks all the country, not herein ceded,* to which they have a just claim, and to make good to them any losses they may incur in consequence of the illegal conduct of any citizen of the United States within the Creek country." (Emphasis ours)

Treaty of March 24, 1832. (7 Stat. 366).

Article 14:

"*The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians,* nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to *govern themselves,* so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and will also as soon as the boundaries of the Creek country West of the Mississippi are ascertained, cause a patent or grant to be

executed to the Creek tribe; agreeably to the 3d section of the Act of Congress of May 2d, (28) 1830, entitled 'An Act to provide for an exchange of lands with the Indians residing in any of the States, or Territories, and for their removal West of the Mississippi.' "
(Emphasis ours)

Treaty of February 14, 1833 (7 Stat. 417).

Article 3:

"The United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Treaty of June 14, 1866 (14 Stat. 785).

Article 3:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; *the eastern half of said Creek lands, being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation;* and in consideration of said cession of the west half of their lands, estimated to contain three millions two hundred and fifty thousand five hundred and sixty acres, *the United States agree to pay the sum of thirty (30) cents per acre,* amounting to nine hundred and seventy-five thousand one hundred and sixty-eight dollars, * * *". (Emphasis ours)

Article 12:

"*The United States reaffirms and reassumes all obligations of treaty stipulations with the Creek nation*

entered into before the treaty of said Creek nation with the so-called Confederate states, July tenth, eighteen hundred and sixty-one, not inconsistent herewith; and further agrees to renew all payments of annuities accruing by force of said treaty stipulations from and after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleventh." (Emphasis ours)

STATUTES.

Indian—Five Civilized Tribes:

Act of May 28, 1830 (4 Stat. 411, 412).

Section 3:

"*And be it further enacted,* That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, *that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them;* and if they prefer it, *that the United States will cause a patent or grant to be made and executed to them for the same:* Provided always, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same." (Emphasis ours)

Act of March 3, 1893 (27 Stat. 612, 645).

Section 15:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be *in all respects citizens of the United States.* * * *"

Section 16:

"The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw

Nation, the Muscogee (or Creek) Nation, the Seminole Nation, *for the purpose of the extinguishment of the national or tribal title to any lands* within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians * * *." (Emphasis ours)

Act of June 28, 1898 (30 Stat. 495, 497).

Section 11:

"* * * Provided further, That the lands allotted shall be non-transferable until after full title is acquired and shall be liable for no obligations contracted prior thereto, by the allottee, *and shall be nontaxable while so held.* * * *" (Emphasis ours)

Indian—Creek Tribe:

Act of March 1, 1901 (31 Stat. 861).

Section 7:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands *shall not be alienable by the allottee or his heirs at any time before the expiration of five years* from the ratification of this agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for *twenty-one years*, for which he shall have a separate deed, conditioned as above: * * *

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and dis-

tribution of the Creek Nation, free from such limitation." (Emphasis ours)

* * * * * * * * *

Section 44:

"This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith."

Act of June 30, 1902 (32 Stat. 500).

Section 16:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this suplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. * * *"

Indian—Five Civilized Tribes:

Act of April 26, 1906 (34 Stat. 137).

Section 19:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes *shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act,* unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: * * * *Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands*

shall be exempt from taxation as long as the title remains in the original allottee." (Emphasis ours)

Section 23:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided,* That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

Act of May 27, 1908 (35 Stat. 312).

"* * * All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, *and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood,* including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *" (Emphasis ours)

• • • • • • • • • •

Section 4:

"That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

• • • • • • • • • •

Section 8:

"That section twenty-three of an Act entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and other purposes,' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words 'or a judge of a county court of the State of Oklahoma.'

Act of May 10, 1928 (45 Stat. 495) *as amended by the Act of May 24, 1928* (45 Stat. 733).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands alotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: * * *".

Section 3:

"That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production."

Section 4:

"That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acress shall be subject to taxation by the State of

Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: Provided, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes, a certificate designating and describing the tract or tracts so selected: * * * and said lands, designated and described in the approved certificates, so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: Provided, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: And Provided further, That the tax exempt land of any such Indian allotees, heir or devisee shall not at any time exceed one hundred and sixty acres."

Act of January 27, 1933 (47 Stat. 777).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian bloods, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner pro-

vided by law: Provided, further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres: And provided further, That all minerals including oil and gas, produced from said lands so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. 495)."

REVENUE:

Revenue Act of 1926, c. 27, 44 Stat. 9.

"Sec. 302 (as amended by Sec. 404 of the Revenue Act of 1934). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of *all property, real or personal, tangible or intangible,* wherever situated, except real property situated outside the United States—

"(a) *To the extent of the interest therein of the decedent at the time of his death;* * * *" (Emphasis ours)

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 904

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF JEANETTA BURGESS, NEE TIGER, DECEASED CREEK, ROLL NO. 5069, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–22) is reported in 42 B. T. A. 958. The opinion of the Circuit Court of Appeals (R. 54–59) is reported in 123 F. (2d) 787.

JURISDICTION

The judgment of the court below was entered on November 11, 1941. (R. 60.) The petition for

a writ of certiorari was filed on January 27, 1942. The jurisdiction of this Court is predicated upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether a restricted full-blood Creek Indian, who died on January 10, 1935, had an interest in her restricted property subject to the federal estate tax.

(2) Whether the estate of the decedent is otherwise exempt from the federal estate tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set forth in the Appendices, *infra*, pp. 12–20.

STATEMENT

The facts as stipulated by the parties and as found by the Board of Tax Appeals are as follows:

The petitioner is the Superintendent of the Five Civilized Tribes and has under his supervision and jurisdiction affairs of the estate of the decedent herein, Jeanetta Burgess, nee Tiger; he is the representative of the Secretary of the Interior who is the fiduciary of the estate of the decedent and required to return and pay such taxes as may be due from the estate (R. 14). The decedent was a full-blood Creek Indian enrolled opposite Roll No. 5069. At the time of her death on January 10, 1935, she was under full restric-

tions as to all real and personal property (R. 15), and was the owner of 160 acres of land in Creek County, Oklahoma, which had been allotted to her (by deeds bearing date of November 10, 1903 (R. 35–38)) under an agreement between the United States and the Creek Tribe of Indians, dated March 8, 1900, ratified by Act of Congress March 1, 1901, c. 676, 31 Stat. 861, and by the Creek Nation on May 25, 1901 (R. 15, 35–39). That tract of land was at the time of the decedent's death and still is fully restricted and cannot be sold, leased, or otherwise encumbered without the approval of the Secretary of the Interior (R. 6).

On March 13, 1912, the decedent entered into an oil and gas lease covering the tract of land for a period of ten years or as long thereafter as oil and gas might be produced in paying quantities. This lease was approved by the Secretary of the Interior on June 29, 1912. The first royalties under this lease were received for the decedent by the Superintendent of the Five Civilized Tribes in 1915. The lease is still producing in paying quantities and the royalties therefrom are still paid to the Superintendent of the Five Civilized Tribes (R. 15–16).

During the years 1917, 1918, and 1919, the Secretary of the Interior purchased for the decedent Liberty Loan and Victory bonds of a face value of $264,800. At the time of her death there were credited to her account Liberty Loan bonds and Treasury bonds of a face value of $214,800,

which had a then fair market value of $227,243.41 (R. 16). She also had a cash credit of $4,754.89, with the Superintendent of the Five Civilized Tribes (R. 16).

The income from decedent's restricted allotment, as well as the bond and open account interest, was credited to her account with the Superintendent of the Five Civilized Tribes and disbursed under supervision of the Secretary of the Interior. The greater portion of decedent's funds was deposited by the Superintendent of the Five Civilized Tribes with the Treasury of the United States and the balance of her funds was deposited with banks. Decedent had the use of such funds from her account with the Superintendent of the Five Civilized Tribes under departmental supervision in the purchase of personal property for her. Title to personal property purchased, other than clothing, etc., was taken on a restricted bill of sale in the name of the United States for the use and benefit of the decedent. All investment problems concerning the decedent's restricted funds were handled by the Superintendent of the Five Civilized Tribes under departmental supervision (R. 16).

Total royalties paid for the decedent's account, up to the date of her death, under the oil and gas lease amounted to $513,491.30. During this period the decedent's account was also credited with interest on bonds amounting to $123,562.74, and

interest on her cash balance with the Five Tribes agency amounted to $27,312.71 (R. 16–17).

On August 26, 1931, the decedent executed an instrument purporting to be her last will and testament. This will was declared invalid by the United States District Court for the Eastern District of Oklahoma on March 5, 1938, on the ground of incompetency of attesting witnesses. The decree of the District Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit on April 11, 1939 (103 F. (2d) 503) (R. 17). On June 30, 1939, the County Court of Seminole County, Oklahoma, entered a decree determining the heirs of decedent. These were her husband, seven living children, three grandchildren, and the wife of a deceased son. The husband and each of the seven living children were given a one-tenth interest in the estate and the grandchildren and the wife of the deceased son were each given a one-twentieth interest in the estate. All of the heirs are full-blood Indians and were at the time of decedent's death, and still are, fully restricted. Except for the decedent's husband, all the heirs were born subsequent to March 4, 1906. At the time of decedent's death, decedent's husband had 160 acres of land designated tax-exempt under the Act of Congress of May 10, 1938, but none of the other heirs had any land designated as tax-exempt under that Act (R. 17). Since the decedent's heirs are fully restricted, no actual distribution has

been made of the estate of decedent but all of the funds, except such amounts as were disbursed under departmental supervision for the support and maintenance of decedent's heirs, have at all times since the decedent's death been retained by the Superintendent of the Five Civilized Tribes under the supervision of the Secretary of the Interior in trust for the heirs of the decedent. The share to which each heir of the decedent is entitled will be credited to the account of such heir on the books of the Interior Department in the Office of the Superintendent of the Five Civilized Tribes (R. 17–18). From 1914 to the date of her death, the decedent received average monthly payments from the Superintendent of the Five Civilized Tribes of $960. The total amount credited to her account amounted to $444,811.90 (R. 18).

The Commissioner determined that the decedent's estate, consisting of her homestead allotment, the Liberty Loan and Treasury bonds, and cash, was subject to the federal estate tax under the Revenue Act of 1926, as amended, and assessed a deficiency accordingly (R. 9–12). The Commissioner's determination was sustained by the Board of Tax Appeals (R. 22–23), and the Circuit Court of Appeals affirmed (R. 60).

ARGUMENT

There is no occasion for further review, since the decision below is in accord with the decisions

of this Court, and there is no conflict with any decision of any other court.

(a) With respect to the first question there would appear to be no doubt that the decedent had the complete beneficial interest in her property and that that interest was subject to tax when it passed to her heirs at her death. *Superintendent* v. *Commissioner,* 295 U. S. 418; *Choteau* v. *Burnet,* 283 U. S. 691. In the first of these cases it was held that a full-blood Creek Indian had sufficient interest in income derived from his property to be taxable thereon despite the fact that his property and income were restricted. The Court there said (p. 421): "The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden." To be sure, the decedent's property was restricted and was managed for her by designated officers, but they acted strictly in a fiduciary capacity. See *Mott* v. *United States,* 283 U. S. 747, 751–752.

(b) Both the Board of Tax Appeals and the Circuit Court found it unnecessary to decide whether any of the treaties with, or statutes relating to, the Creek Indians grant any exemption to those Indians from a direct tax upon their allotments. There is, however, no basis for the petitioner's contention that any of these treaties or statutes grant any present exemption from any tax

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imposed by the Federal Government. In the court below the essence of the petitioner's argument was based upon the contention that an exemption from the estate tax might be found in section 19 of the Act of April 26, 1906 (Appendix B, *infra*), which provided that "all lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation as long as the title remains in the original allottee." This Court has already held that this section was superseded by section 4 of the Act of May 27, 1908,[1] and there would, therefore, appear to be no basis for any argument that the decedent's property was exempt from any form of tax imposed by the Federal Government.[2] However,

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[1] *Superintendent* v. *Commissioner*, 295 U. S. 418, 420–421: "The suggestion that exemption must be inferred from the Act of April 26, 1906 (34 Stat. 137) or May 27, 1908 (35 Stat. 312) is not well founded. The first of these extended restrictions upon the alienation of allotments for twenty-five years unless sooner removed by Congress, and provided: 'Sec. 19 * * * That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.' This exemption related to land and not to income derived from investment of surplus income from land. Moreover, the Act itself was superseded by the second one, which did not contain the quoted provision, but declared: 'Sec. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes * * *.'"

[2] No exemption can be based upon the Original Creek Agreement of 1901, as amended by the Supplemental Creek

neither the Board nor the court below found it necessary to decide this point since even upon the assumption that the decedent's property was exempt from a direct tax, it is clear that such an exemption would not extend to the estate tax which is a transfer tax rather than a tax upon property. *U. S. Trust Co.* v. *Helvering,* 307 U. S. 57; *Plummer* v. *Coler,* 178 U. S. 115; *Greiner* v. *Lewellyn,* 258 U. S. 384; cf. *Knowlton* v. *Moore,* 178 U. S. 41.

There is no merit to petitioner's suggestion (Pet. 3) that the decision below conflicts in principle with *Heckman* v. *United States,* 224 U. S. 413; *Mullen* v. *United States,* 224 U. S. 448; *Choate* v. *Trapp,* 224 U. S. 665; *English* v. *Richardson,* 224 U. S. 680; *Carpenter* v. *Shaw,* 280 U. S. 363; *Superintendent* v. *Commissioner,* 295 U. S. 418; and *United States* v. *Santa Fe Pacific R. R. Co.,* No. 23, this Term, decided December 8, 1941.

Choate v. *Trapp* and *English* v. *Richardson* both involved *direct* taxes imposed by a state upon Indian allotments in clear violation of the exemption granted by the Original and Supplemental Creek Agreements. But, as has been pointed out

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Agreement of 1902, since any exemption flowing from those agreements expired twenty-one years from the date of the allottee's deeds. See Section 16 of the Supplemental Creek Agreement, Appendix B, *infra*, p. 16. The deeds of the decedent herein bore date of November 10, 1903 (R. 35–38). The decedent died on January 10, 1935 (R. 15).

above (footnote 2), any exemption flowing from those agreements expired long prior to the death of the decedent herein. Furthermore, questions of state power to tax restricted Indian property were regarded as involving problems of the immunity of federal instrumentalities from state taxation. See *Choteau* v. *Burnet,* 283 U. S. 691, 696. Such problems are of course not present in the instant case.

Carpenter v. *Shaw* similarly involved a direct tax imposed by a state on allotments of Choctaw Indians, in violation of the Atoka agreement with the Choctaw and Chickasaw Tribes embodied in Section 29 of the Act of June 28, 1898, ratified August 24, 1898, c. 517, 30 Stat. 495.

The *Heckman, Mullen,* and *Santa* Fe cases were not tax cases at all and enunciated no principles at variance with those applied by the court below.

We recognize that this case involves the estate of a ward of the Government and for that reason we would be slow to oppose certiorari in a doubtful situation, but we think that the decision below is correct and does not call for review by this Court.

CONCLUSION

The decision below is correct. There is no conflict with any decision by this or any other Court.

The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

FEBRUARY 1942.

APPENDIX A

Revenue Act and Regulations Involved

Revenue Act of 1926, c. 27, 44 Stat. 9, 69:

TITLE III—ESTATE TAX

* * * * *

Sec. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States (U. S. C., Title 26, Sec. 410, 460).

* * * * *

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death (U. S. C., Title 26, Sec. 411).

* * * * *

Treasury Regulations 80 (1934 ed.), promulgated under the Revenue Act of 1926:

GROSS ESTATE—GENERAL

* * * * *

ART. 10. *Character of interests included.*—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

* * * * *

APPENDIX B

Treaties and Legislation Affecting the Creek Nation and the Five Civilized Tribes

Original Creek Agreement, March 1, 1901, c. 676, 31 Stat. 861:

* * * * *

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

* * * * *

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his

heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided,* That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.

Supplemental Creek Agreement, June 30, 1902, c. 1323, 32 Stat. 500:

* * * * *

DESCENT AND DISTRIBUTION

6. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), insofar as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent

and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49.

MISCELLANEOUS

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16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made

for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

Act of April 26, 1906, c. 1876, 34 Stat. 137:

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SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in

case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

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Act of May 27, 1908, c. 199, 35 Stat. 312:

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SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided,* That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the re-

moval of restrictions, other than contracts heretofore expressly permitted by law.

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SEC. 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma."

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in any event the issue hereinbefore provided for die before April

twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

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